SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 5

UNITED STATES OF AMERICA,
Petitioner,

vs.

HARVEY L. CARIGNAN

N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

HAROLD J. BUTCHER,
Attorney for Respondent.

INDEX

CITATIONS

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Opinions Below

The opinions of the Court of Appeals (R. 283-298) are reported at 185 F. 2d 954.

Jurisdiction

The judgment of the Court of Appeals was entered December 8, 1950 (R. 299). On January 3, 1951, the time within which to file a petition for a writ of certiorari was

extended by order of Mr. Justice Douglas to and including February 6, 1951 (R. 299). The petition was filed on February 5, 1951, and was granted on May 21, 1951. The jurisdiction of this Court is conferred by 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

Questions Presented

Respondent restates the questions presented in the government brief to more closely conform with the facts and the opinion of the Court below and also presents other questions of grave relevancy to a comprehensive and clarifying opinion.

First Question

Respondent, a soldier, being suspected of an assault upon a woman, one Christine Norton, was brought, by an officer, from Fort Richardson, a military post near Anchorage, to the Anchorage Police Station in the forenoon of the 16th day of September, 1949. There he was interrogated by City Police Officers in connection with the Norton assault and was also interrogated concerning another woman, Agnes Showalter, who had been found dead on the morning of August 1, 1949. During the interrogation, respondent admitted the assault upon Christine Norton but denied any knowledge of the death of Agnes Showalter. He was, however, positively identified by the witness Keith as the man in the grass beside the woman who Keith subsequently found dead (R. 120). Respondent was held in the Police Station during the interrogation and until about 4:30 P. M. of the 16th, at which time or shortly thereafter a Deputy U. S. Marshal placed respondent under arrest on the Norton charge, whereupon he was taken before the U. S. Commissioner who informed him of the Norton charge, advised him of his rights, set bail at $5,000.00, and ordered him into the

custody of the U. S. Marshal pending grand jury investigation. Unable to make bail, he was returned to the city jail and while in custody there, was further interrogated by City Police. On the following morning, September 17th, 1949, he was taken from the jail to the office of the U. S. Marshal, where the interrogation was continued with the Marshal participating. Near the hour of 12 o'clock A. M. on the 19th day of September, after several sessions of exhaustive questioning, he admitted in writing that he had, on the evening of July 31, struck with his fists, a woman who he subsequently learned was Agnes Showalter. The question is whether the Court of Appeals erred in holding that respondent's confession was inadmissible because the circumstances of its taking violated the spirit and intent of Rule 5, Federal Rules of Criminal Procedure and the rule of *McNabb* v. *U. S.*, 318 U. S. 332, as further expounded in *Upshaw* v. *U. S.*, 335 U. S. 410, because at the time it was taken, respondent although in lawful custody on the Norton charge and although he had been previously positively identified as the man who had been with the woman at the place where she was later found dead, had not been arrested, had not been taken before a magistrate, and had not been charged with the Showalter death, or informed of his rights in connection therewith.

Second Question

Whether the trial court erred when it admitted into evidence over respondents objection, respondents purported confession, after refusing his request to testify, in the absence of the jury, as a matter preliminary, to the admission of the confession, which had been offered in evidence by the prosecution on the testimony of the police officer who had received it and whose testimony the respondent was

unwilling to let stand as a true version of the interrogatory process, leading to the making of the confession.

Third Question

Whether respondent's confession, taken under the circumstance set forth in the record, was involuntary in character as being extracted by secret interrogation, promises, inducements, and psyschological pressure on the part of the Police Officers.

Fourth Question

Whether the trial court having ruled defendant's purported confession admissible, solely upon the testimony of a Police Officer testifying for the Prosecution (R. 233) and having denied defendant's objection to the introduction of the confession on the ground that it was not voluntary, and having refused to hear the defendant's version of the taking of the confession, erred in failing to submit to the jury, by appropriate instruction, as a question of fact, the voluntary or involuntary character of the confession (Instructions R. 23 to 28, incl.).

Statutes and Rule Involved

Alaska Compiled Laws Annotated, 1949:

> Sec. 65-4-1. *First degree murder.* That whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall suffer death.
>
> Sec. 65-4-2. * * * That in all cases where the accused is found guilty of the crime of murder under this and the next preceding section, the jury may qualify their verdict by adding thereto "without capital punishment"; and whenever the jury shall return a ver-

dict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life.

Rule 5, Federal Rules of Criminal Procedure:

(a) *Appearance Before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

Statement of Facts

Respondent adopts for the purpose of this brief the statement of fact contained in the brief filed by the government with the following corrections.

The confession as set out in the record (R. 233-235) states at line 10, page 235 "The first thing I remembered was me sitting and hitting a woman in the face with my fists". There is no statement in the confession that defendant was sitting on the woman and, therefore, the government's brief is inaccurate as to that fact (Government Brief, page 5, line 11).

The government in its brief, page 6, line 9, uses the phrase "brief questioning". Respondent was taken to the Police Station on the forenoon of September 16th. He was detained there until 4:30 P. M. (R. 174). He was questioned by Police Officer Barkdoll (note Barkdoll's confusion as to length of question period R. 176, line 25 to end of page). He was questioned by C. I. D. Officer Peterson, who brought respondent to the Police Station in the morning and remained there with him all afternoon (R. 194). He was picked out of a "line up" by Christine Norton, as the man who assaulted her. He was picked out of a "line up" by the witness Keith who positively identified respondent as the man whom he had seen beside the woman on the evening of July 31, whom the witness later found dead (R. 120-121).

Respondent believes that the description here and elsewhere in the government's brief, as to the period of time occupied by the interrogation, as "brief" or "briefly" cannot be supported by the record.

On page 7 of the government brief, it is twice stated that respondent was immediately arraigned before the Commissioner charged with assault with intent to commit rape. The fact is that he was not arraigned before the Commissioner at any time, but was only taken before the Commissioner in the late afternoon of September 16th, where the complaint was read, where he was advised of his rights and where he was committed to the custody of the Marshal with bail set at $5,000.00 to await action of the grand jury. Respondent was actually arraigned on the Christine Norton charge on October 19th, when the indictment was read and counsel appointed for him. (See certified copy of indictment, minutes of arraignment, etc., all in *Norton* case, forwarded by the Clerk of the District Court for the Third Division, Territory of Alaska, to the Clerk of the Supreme Court, under seal.)

The statements contained in the last paragraph on page 7 of the government brief, are not correct. At the time Officer Barkdoll advised the U. S. Marshal of respondent's arrest, and it was decided that the Marshal should question respondent "in an endeavor to get a statement from him as to whether or not he had anything to do with the Showalter case (R. 233)." Respondent had already been positively identified by the witness Keith as the man who was in the grass with Agnes Showalter at Eighth and A Streets on the evening of July 31st, subsequently found dead by Keith (R. 120). Therefore, the statement on Page 7 that the similarity of the two attacks was the only reason for the questioning of respondent by the Marshal is untrue.

The government on page 10, line 18, states that U. S. Marshal Herring *might* have suggested to respondent, while he had him looking into the pictured eyes of Christ, "that his Maker might think more of him if he told the truth about this". The record (R. 231, line 4 to 10) indicates that the Marshal not only *might* have suggested the fear-of-God appeal to respondent but in fact did suggest it. (Emphasis ours.)

However, all the while, together with the Marshal, in his office, in the grand jury room and elsewhere, the two officers, Miller and Barkdoll (R. 224, 228, 229, 230), suggesting to respondent that he make a statement and suggesting that the Marshal was a pretty big man and would be able to help him (respondent) if he would only give the statement (R. 230). Important also as fact and omitted from the government's brief is the discussion between the Marshal and respondent of McNeil Island Prison, the conditions and opportunities there to learn trades, the fact of which discussion, on cross examination, the Marshal first denied (R. 231, lines 26 to end of page), and then admitted.

Argument

First Question

At the commencement of the trial, respondent's counsel moved the court to dismiss the indictment on the grounds that the respondent had not been arrested or charged with the crime for which he was brought to trial, as provided by Rule 5 of the Federal Rules of Criminal Procedure (R. 43).

The respondent had been arrested on the 16th day of September by the authorities, suspected of an "assault with intent to commit rape upon a woman", one Christine Norton, and following several hours of questioning he admitted the assault and was taken before the United States Commissioner, where respondent was informed of the charges against him and advised of his rights. He was thereupon removed to the jail where he was interrogated intermittantly but at least for hours at a time from the 16th day of September to the 19th day of September, in connection with the death of the woman found in the park at Eighth and A Streets on the first day of August, 1949, and after four days, during which the interrogation occurred, the respondent signed the confession which was introduced into evidence, marked as Plaintiff's Exhibit No. 14 (R. 233), and during this time respondent was not legally charged with the murder for which he was subsequently indicted, nor was he at any time, prior to his confession, taken before a magistrate, nor was he ever informed of his constitutional rights by a magistrate or given the benefit of counsel in connection with said charge. He was indicted on the 12th day of October for murder in the first degree without benefit of previous appearance, or preliminary hearing and without benefit of counsel during such period of time. Following the indictment and on the 14th day of October, respondent, for the first time, was given the benefit of counsel. The

Federal Rules of Criminal Procedure, Rule No. 5, a and b, provide for an appearance before the Commissioner, and so far as respondent can determine, the rule makes no exception. It will, of course, be argued by the government, that because the respondent was already arrested and lawfully held in connection with another and completely independent crime there was no need to make a subsequent charge of the killing of the woman on the 31st day of July, but it would seem that the constitutional safeguards which were intended to apply in criminal procedures should not be disregarded simply because a man had been arrested and charged with some other crime. In the event that he was to be held primarily for a greater crime and particularly a capital crime where life might be forfeit and interrogated in connection with the same is more reason for taking the respondent before a magistrate and advising him that he was being held also in connection with the killing of the woman Agnes Showalter on July 31, and advised him that anything he might say would be used against him and given benefit of counsel in connection with that crime. This protection provided by F. R. C. P. Rule No. 5, seems to have been disregarded in connection with the matter in which respondent was tried and sentenced to death, and he contends that the failure to take him before a magistrate, to advise him of his rights, and to give him benefit of counsel was a denial of his constitutional rights and exposed him to the prolonged, secret, interrogation of the police authorities. It is revealing to note that the police officers succeeded in getting a statement from respondent admitting the assault on Christine Norton before taking him before the Commissioner on that charge even though he had previously been identified by Christine Norton as the man who assaulted her. Does it not seem probable that police officers would follow the same pattern of procedure in the *Showalter* case? The positive

identification of respondent by the witness Keith as the man with the woman who was found dead would have been more than sufficient to arrest respondent and charge him with the killing, had the officers not determined first to get a confession.

Respondent first arrived at the police station in the forenoon of the 16th day of September and between that time and Saturday, September 17, when U. S. Marshal Herring took charge of the interrogation process, City Police Officers had questioned respondent for several hours regarding the Showalter murder (R. 159-170-176-223-224). They were able to report to Marshal Herring that "it looked awful good" (R. 224), and it was Marshal Herring's assumption that respondent had been "*talked to*" (R. 224). There is nothing in the record to show just what form the interrogations by the City Police took during the 25 hours respondent was in their hands before Marshal Herring took over the examination, except that it began by respondent being shown a photograph of the dead body of Mrs. Showalter (R. 159-160). However, the testimony of the Marshal shows that from the moment he (Marshal Herring) assumed control of defendant, the psychology of the interrogation process was to be "the utmost courtesy at all times, as if a guest in my own home" (R. 221). "That (utmost courtesy according to the Marshal's testimony) was something that was stressed from the beginning" (R. 221). Marshal Herring further testified that everything respondent wanted for his comfort was furnished—cigarettes, water, a cushion for his chair, etc. Respondent was taken to a restaurant and fed, his meal being paid for "out of my (Marshal Herring's) own pocket" (R. 224). Respondent, after receiving these alleged favors and courtesies, stated to the Marshal, according to the Marshal's testimony, that he desired to talk to

the Marshal alone, out of the presence of City Police Officers Barkdoll and Miller (R. 221-229).

There is a conflict in the government's testimony as to why respondent was kept in the city jail instead of the Federal jail during the three day period of interrogation by the U. S. Marshal. Officer Barkdoll testified that "the only reason the boy (respondent) wasn't brought over to the Marshal's jail (Federal jail) was because they (Federal Officers) did not have adequate room for him." (R. 175). Yet shortly afterwards he (Barkdoll) testified that two "ladies" were removed from the city jail to the Federal jail so there would be room for respondent in the city jail. (R. 176). Marshal Herring admitted on cross-examination that two women prisoners were moved from the city jail over to the Federal jail, "so that he (respondent) could be alone by himself without being disturbed." (R. 227).

The issue in the present case, as urged by the government does not require reversal by this Court on certiorari. In writing the majority opinion below, Judge Healy established the issue as follows:

"What the Court has to decide is whether the circumstances outlined were such as to bring the case within the *spirit* and *intent* of Rule 5 and the holding of the McNabb decision, 318 U. S. 332, as further expounded in Upshaw v. U. S. 355 U. S. 410." (R. 228). In its specification of error to be urged, the government has carefully avoided mention of the spirit and intent of Rule 5, has ignored the spirit and intent of the McNabb and Upshaw decisions, has disregarded the extensive dicta set forth in the decisions by this Court in the above named cases, and has advanced the contention that the McNabb Rule hangs suspended in its entirety by the thread of strict construction of the government's selected phrase "illegal detention." (Emphasis ours).

The Court below decided first, that the circumstances outlined in this case bring it within the spirit and intent of Rule 5; and secondly, wtihin the scope, spirit and intent of the McNabb decision as further expounded in Upshaw v. U. S.

The basic criterion for applying the McNabb rule is not *illegal detention*. This is made clear in U. S. v. Mitchell 322 U. S. 65. On p. 70 thereof, this Court speaking through Justice Frankfurter said "Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining mis-conduct," (on the part of officers of the law). In the Mitchell case an illegal detention of eight days occurred following Mitchell's arrest and his prompt and spontaneous confession. The subsequent illegal detention was held not to retroactively change the circumstances under which he made the disclosure. (U. S. v. Mitchell 322 U. S. on p. 70).

In the instant case there was no prompt and spontaneous confession. It occurred only after four days of repeated interrogation. The record is incomplete as to what took place in the city jail between the time respondent was first brought before the City Police Officers by the C. I. D. Officer from Fort Richardson and twenty-five hours later when Marshal Herring took charge of the interrogation process, but the record does show that respondent, after that period, was susceptible to the psychological treatment and questioning of the U. S. Marshal. While on the one hand respondent did ultimately talk to Marshal Herring, on the other he declined to do so in the presence of the City Police Officers who had previously "questioned" him during the first twenty-five hours of his detention, (R. 221-229) at least five hours of which took place prior to his appearance before the U. S. Commissioner on the charge of assault

with intent to rape Christine Norton, or on any charge whatever.

Respondent, during his trial, desired to relate facts regarding his treatment at the hands of City Police Officers and the U. S. Marshal during the four day period of interrogation. He asked leave of the trial court to relate those facts, i. e., to testify in the absence of the jury as to the events and circumstances leading to the making of the confession. The trial court denied him this right and respondent's testimony was not heard. It should have been heard, and if it had been, the court then would have had the benefit of the defendant's testimony as to why defendant wished to avoid the City Police, and the reason why from out of his fear and reluctance he finally made a statement to the Marshal. The evidence here is not only consistent with, but indicates a strong possibility that this is a case of over-zealous officers working singly and in pairs in the quizzing of a suspect; to alternate from harshest kind of treatment to the other extreme of courtesy and kindness, with one officer playing the part of the relentless inquisitor and the other acting as the father-confessor to the accused. One abuses, the other appears to protect, sympathizes and promises, the object being to convince the suspect that only the presence of the gentle one restrains the other from conducting the inquisition in his own way.

The government states that the McNabb rule does not come into play unless the confession occurred during an illegal detention, and that the McNabb rule is not based upon constitutional considerations, but is a rule of evidence enunciated by this Court in "the exercise of its supervisory authority over the administration of criminal justice in the Federal Courts. It implements the policy of legislation (now embodied in Rule 5) requiring the prompt arraignment before a magistrate of a person arrested for crime."

While it may be true that the McNabb rule of itself is

not based upon constitutional considerations, it is manifest that were this Court to adopt the government's reasoning, thus holding in effect that in any case where a person is in legal custody charged with a crime, the requirements of Rule 5 are dispensed with as to another and separate crime, other constitutional considerations would arise accordingly, to-wit: denial of *due process of law* and *equal protection of the law.*

In the instant case, bail was set for respondent Carignan at the time of his appearance before the Commissioner on the earlier charge of assault with intent to rape Christine Norton. Unable to furnish bail respondent remained in jail in legal custody on that charge only. While under such legal detention he was removed from his cell on several occasions and subjected to questioning by the U. S. Marshal over a period of three days, during which time he was not under legal detention in connection with the Showalter murder. If he had been able to furnish bail then he would have been released immediately after his appearance on the assault-with-intent-to-rape charge and would have been under no detention whatever. To be then questioned by law enforcement officers (unless by his voluntary consent) re the Showalter murder, it would have been necessary to re-arrest him on the charge of murder, in which case the necessity of promptly taking him before a magistrate on the second charge cannot be denied.

Thus, if the government's argument were followed, where there are two or more separate crimes involved and an appearance is made upon only one of them, then the application of Rule 5 would turn upon the sole question of whether or not the accused is able to furnish bail. It would deny due-process of law and equal protection of the law to that class of persons charged with crime or who are being interrogated in connection with other crimes and *who are*

unable to furnish bail, on the one charge upon which the appearance had occurred.

Surely it would be unjust, if not unconstitutional, to deny an accused the protection of Rule 5 merely because he is poor, friendless and unable to furnish bail. No surer way of fostering the evil implications of secret interrogation, condemned by the *McNabb* and *Upshaw* decisions, and increasing the use of "third degree" practices by police officers could be found than that which would follow if the government's theory were upheld.

Assuming for the purpose of this argument that the Government's interpretation of Rule 5 of the Federal Rules of Criminal Procedure is the correct one, and that this Court should decide that the spirit and intent of Rule 5 had been complied with in the subject case, thus the Court having established a case rule based on the government's theory, law enforcement officers could then use that precedent as an additional device in their attempts to get confessions from persons suspected of crimes. An interpretation of Rule 5 of that character would give the law enforcement officers, particularly police officers, an opportunity to cloak their inquisitorial activities under the color of law. In such event, law enforcement officers taking into custody a suspect or a person having been identified in some connection or other with criminal conduct or even on the barest suspicion could be taken immediatoly before a magistrate and charged with any sort of fictitious criminal conduct, for instance vagrancy, which is a common charge when holding suspects for interrogation, or even a traffic violation and thus having fulfilled the requirements of Rule 5, could with perfect freedom proceed to the real purpose for holding the suspect and the interrogation could then be pursued as relentlessly as though no rule existed, all subsequent police conduct could be clothed with the legality of having fulfilled the obligations of Rule 5. The possibilities of such

an interpretation as an aid to the circumvention of the McNabb Rule are unlimited and rather than protect suspects from the third degree and excessive interrogation would be a new device for the extraction of involuntary confessions and clothe all such interrogation with legality.

We, therefore, urge that the opinion of the Circuit Court of Appeals as rendered, with reference to the spirit and intent of Rule 5 is the only correct legal view and that no error was committed by the Appellant Court on that proposition.

Argument

Second Question

The error of the trial court, in refusing to permit respondent to take the witness stand, as a preliminary matter, in the absence of the jury, prior to the admission of the confession into evidence having been conceded as error by the government and its acknowledgment that a new trial would have to be held in any event, no argument is made on behalf of the Respondent to support the proposition set forth in the Second Question.

Argument

Third Question

Respondent contends that the purported confession, identified as plaintiff's exhibit No. 14 (R. 233) was not a voluntary confession but that it was procured by the United States Marshal, with the assistance of police officers, from the respondent under such circumstances as to make it inadmissible, and that in the admission of the statement for consideration by the jury, the trial court committed prejudicial error and denied to respondent the right of a fair trial.

Respondent had been arrested in the forenoon of September 16 (R. 174) on the basis of a charge growing out of an alleged assault upon a woman by the name of Christine Norton, and within a short time following his arrest, he was submitted to an interrogation by the Anchorage City Police authorities which continued intermittently until he was turned over to the United States Marshal's office, on or about noon of the 17th of September and that the U. S. Marshal, Paul Herring, continued the interrogation through that afternoon, and to some extent on the following day and through the morning of a third day and obtained from respondent a signed statement on or about noon of the 19th. It is the contention of the government that this statement was a free and voluntary statement, however, it is the contention of the respondent that it was procured from him by prolonged and continuous interrogation, promises, inducements and psychological pressure. The cross examination of the witness, U. S. Marshal Herring will indicate throughout, that the statement was not a voluntary statement, that at no time did respondent appear willing to voluntarily confess the alleged crime, but that on the contrary the U. S. Marshal discussed with him certain working conditions and opportunities for learning trades existing at the Federal Prison at McNeil Island (R. 231) and informed the respondent that there had not been a hanging in Anchorage for a period of 27 years, (R. 230), and inferred that Officer Miller, who was assisting him (Herring) in the interrogation, could have made the promises which he (the Marshal) denied making, and that the U. S. Marshal exposed respondent to the strongest sort of psychological pressure, in taking him into the room where the Marshal displayed a number of religious plaques, telling respondent to look into the eyes of his Maker (a plaque with the head of Christ depicted thereon), and suggested that his Maker

might think more of him if he told the truth about this. (R. 231).

In the case of Watts vs. Indiana 338 U. S. 49, in an opinion written by Justice Frankfurter, the following language is found: "A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered, but if it is the product of sustained pressure by the police, it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.

This is so because it violates the underlying principle in our enforcement of the criminal law. Ours is the accusatorial as opposed to the inquisitorial system. * * * Under our system society carries the burden of proving its charge against the accused, not out of his own mouth. It must establish its case, not by interrogation of the accused, even under judicial safeguards, but by evidence independently secured through skillful investigation. The law will not suffer a prisoner to be made the deluded instrument of his own conviction. * * * "

In the case of McNabb v. U. S. 318 U. S. 322, the defendants were not taken promptly before a magistrate and the case revolves around the fact that prolonged questioning on the part of police officers occurred while the defendants were illegally restrained which facts differ from the present case in that Carignan was legally held on another charge

and had been taken before a magistrate on the other charge, but, however, all of the other factors in the McNabb case are present in this case.

It is necessary to point out that in the confession itself which was introduced into evidence and which is a part of this Record set forth in full, commencing (R. 233) respondent states:

> "The next thing I remember I was walking down the street with a woman and I hit her in the nose or the face. I did not know this at the time, but it came back to me later when I was trying to piece together in my mind what had happened that night. The first thing I remember was me sitting and hitting a woman in the face with my fists."

In the entire statement, which was introduced into evidence over the objections of the respondent, there is no evidence of rape or intent to rape but only the stupid anger of a drunken man with his companion and the further statement of the defendant at the end of the confession:

> "I believe I need medical attention and should receive it before I am allowed to go out into public."

after which appears the signature of respondent, and this last phrase would indicate, considering all the conversations which preceded it, that some promise had been given to respondent, otherwise there appears to be no necessity for making the statement that he needed medical attention before going out in public, at this stage of the interrogation. It appears that he thought or had been led to believe that he might go free, at least at some future date, and that his neck might not stretch. We further submit that there were sufficient admissions made by the witness Herring during his cross-examination to indicate that inducement

had been held forth to the defendant and that promises had been made to him, the circumstances of which have previously been cited, and that psychological pressure of the most intense sort had been used upon respondent, as has also previously been indicated, and it is therefore the contention of the respondent that the statement was not voluntary and should not have been admitted into evidence to be used as the most important if not the only positive evidence against respondent and that the Court was in error in admitting the statement into evidence.

Argument

Fourth Question

It is contended that the failure of the Court to instruct the jury on the question of the authenticity of the confession and the method by which the confession was procured, was error and that such an instruction should have been given. The case of Cohen vs. U. S. 291 Fed. 368, holds that if the judge feels the confession is admissible, the judge should give the legal tests for the jury to apply to the evidence as a matter of fact, as to whether the confession determines defendant's guilt or innocence. The trial court failed to give any instruction in connection with the confession and such failure was error of such nature as to prejudice the right of the defendant to a fair trial. The following cases support such view:

"In criminal prosecutions, the Court must correctly give the whole law of the case without any request or motion of the defendant to do so." Skidmore vs. Commonwealth, 223 S. W. 2nd, 739.

"Court must instruct jury on the law of the case, whether requested to do so or not, and instructions which, by omission of certain elements, have effect of withdrawing from

consideration of jury essential issue or element of the case, are erroneous." Planck vs. State, 38 N. W. 2nd, 790.

Branm vs. U. S. 168 U. S. 532
Murphy vs. U. S., 285 Fed. 801

Conclusion

The holding of the Court of Appeals that respondent's confession was inadmissible as not being within the spirit and intent of Rule 5, of the Federal Rules of Criminal Procedure and the holding of the McNabb decision as further expounded in the Upshaw case, is so clearly correct and such a legally proper application of the principles involved in Rule 5 and the McNabb and Upshaw cases, that for that reason and the further reasons appearing herein the judgment of the Appeal Court should be affirmed and the case be remanded to the District Court for a new trial as prayed for in the concluding paragraph of the government's brief.

Respectfully submitted,

HAROLD J. BUTCHER,
Attorney for Respondent.